



March 22, 2000

Ms. Susan Combs
Commissioner
Texas Department of Agriculture
P. O. Box 12847
Austin, Texas 78711

OR2000-1126

Dear Ms. Combs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 134354.

The Department of Agriculture (the "department") received a request for "all findings" and "all inspector's records and methods of decision" on incident number 2424-05-99-0028. You indicate you have released to the requestor "the investigation report." You have submitted for our review additional responsive information, marked by you as exhibits "B" and "C." You assert that this information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Among other arguments, you assert that the information is excepted from disclosure as attorney work product under sections 552.101 and 552.107(1). We note that the attorney work product privilege is properly asserted under sections 552.103 or 552.111 where litigation is pending or reasonably anticipated, and only under section 552.111 where litigation has concluded.¹ See Open Records Decision No. 647 at 3 (1996). A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a

¹Because you do not inform this office of the status of the litigation (*e.g.*, whether the litigation is anticipated, is pending, has concluded, or did not occur), we shall consider the attorney work product privilege assertion under section 552.111 of the Government Code.

governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996) (citing *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993)). Upon careful review of your arguments and the submitted information, we believe you have demonstrated that exhibits "B" and "C" were created for trial or in anticipation of litigation under the test articulated in *National Tank*. We note that much of the information contains recitals of fact. This office has stated that the work product privilege does not extend to "facts an attorney may acquire." See Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n. 2 (Tex. 1991); see also *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ)(the attorney work product privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts). As to the facts contained in the submitted exhibits, you state "the facts have been selected and ordered by the agency attorney for the purpose of determining and communicating the legal basis and strategy for the proposed action, such recitations are non-neutral, rather than purely factual or basically factual, summaries or communications." You also represent that the factual information contained in the exhibits has been released to the requestor elsewhere in other released documents. Based on these representations that the facts at issue are non-neutral recitals, and that the facts have otherwise been released in the context of other information, we therefore agree that the recitals of fact in exhibits "B" and "C" are also protected by the attorney work product privilege. Accordingly, you may withhold the submitted exhibits in their entirety as information protected by the attorney work product privilege as incorporated into section 552.111 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

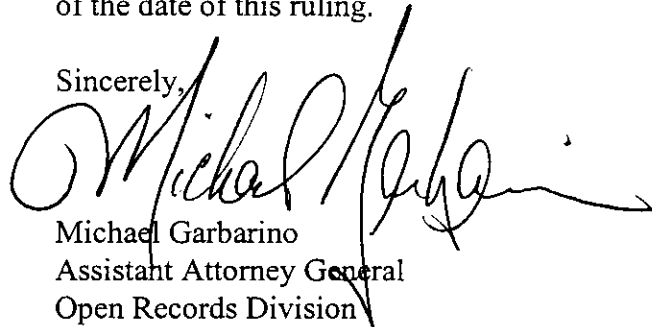
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", is written over the typed name and title.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/ch

Ref: ID# 134354

Encl. Submitted documents

cc: Mr. Richard Kocurek
Route 4, Box 113
Robstown, Texas 78380
(w/o enclosures)